82-949

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KENNETH WAYNE FRICKE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether instructing the jury in a criminal case that an accused is presumed to intend all the natural and probable consequences of an act knowingly done constitutes reversible error.

a. Whether the district court's burden-shifting instruction violates due process of law and is in conflict with this Court's decision in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

b. Whether the use of a presumptive instruction which shifts the burden to the Defendant to disprove an element of the offense, can constitute harmless error.

2. Whether the Court of Appeals erred in failing to reach the constitutionality of the federal regulation, as applied in this case, which required an accused citizen to detail in advance the content of the testimony of his own witness to the superior officer of his trial adversary, and obtain that officer's approval prior to calling the witness, in violation of due process of law flowing from the Fifth Amendment, and the Defendant's right to present witnesses, to compulsory process, and to effective assistance of counsel, guaranteed by the Sixth Amendment.

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The Petitioner, Kenneth Wayne Fricke, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 25, 1982.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is cited as *United States v. Fricke*, No. 80-2215, slip op. at 4559 (5th Cir. August 25, 1982), and the opinion appears in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 25, 1982. A timely Suggestion for Rehearing En Banc was denied on October 4, 1982, and this Petition for Certiorari was filed within sixty (60) days of that date, in accordance with Rule 20.1 of the Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULES AND STATUTES INVOLVED

As provided by Supreme Court Rule 21.1(f), the verbatim quotation of the following Rules and Statutes is set forth in Appendix C hereto.

Title 18, United States Code, § 241
Title 18, United States Code, § 242
Title 28, Code Of Federal Regulations, § 16.21, *et seq.*

STATEMENT OF THE CASE

The Petitioner, along with Co-Defendants Terry Baldwin and Angel Salcido, was indicted for conspiracy to violate the civil rights of one Larry Hintz, 18 U.S.C. § 241, and for violating the civil rights of said Larry Hintz, 18 U.S.C. § 242.

Jury trial commenced on July 21, 1980, before the United States District Court for the Southern District of Texas, the Honorable Woodrow Seals, presiding. On August 1, 1980, the jury returned a verdict finding Baldwin and Petitioner guilty on both counts. Salcido testified for the government and charges against him were dismissed. The court sentenced the Petitioner to ten years in prison on count one and to six months in prison on

count two, to run concurrently. Baldwin was given a probated sentence.

On May 22, 1981, the Petitioner filed his appellate brief with the United States Court of Appeals for the Fifth Circuit, (Docket No. 80-2215), and on January 27, 1982, the case was orally argued before a panel consisting of the Honorable John Brown, the Honorable Thomas Gee, and the Honorable William Garwood.

Relying on *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and *United States v. Chiantese*, 560 F.2d 1244 (5th Cir. 1977), *cert. denied*, 441 U.S. 922, 99 S.Ct. 2030, 60 L.Ed.2d 395 (1979), Fricke contended on appeal that the trial court erred in instructing the jury that a person is presumed to intend all the natural and probable consequences of an act knowingly done, thereby violating due process of law in that the government was relieved of the burden to prove the specific intent element of the offenses charged. The Fifth Circuit found that the instruction was harmless error beyond a reasonable doubt. *United States v. Fricke*, No. 80-2215, slip op. at 4563 (5th Cir. Aug. 25, 1982).

The Petitioner argued that this instruction told the jury to presume, rather than infer, the requisite intent. In the case at bar, the trial court gave a mandatory instruction followed by a curative instruction on burden of proof. (R. XIII, 47)[1] The Fifth Circuit concluded that it was plain from the evidence that Fricke had the requisite specific intent, and that other portions of the charge rendered it unlikely that the jury was significantly affected by the word "presumed." *United States v. Fricke, supra,*

1. Because the record is not consecutively numbered, citations to the record include volume and page number.

at 4563. However, the Petitioner urged that after the curative instruction was given, the trial court applied that presumption to the facts, telling the jury they could conclude that the Petitioner acted in both counts with the specific intent to violate the law as alleged upon a finding by them that the Petitioner knew what he was doing and intended to do what he was doing. (R. XIII, 47) Thus, the Petitioner complained that he could be convicted upon a showing by the government that he knew he struck the complainant and intended to strike him, without any further showing that he intended to violate 18 U.S.C. § 241 and 18 U.S.C. § 242, that is to conspire to violate and to violate the civil rights of the complainant. Therefore, the vice of a mandatory presumption was aptly illustrated; a citizen could be presumed guilty of a greater offense, and the government was relieved of its burden of proof.

The Fifth Circuit stated that:

> In *Chiantese* we refused to adopt a *per se* rule of reversal for these types of charges. However, we also stated that when a charge included this sort of coercive or burden-shifting language we would not uphold it by harmonizing the erroneous instruction with curative statements or phrases contained elsewhere in the charge. Rather, we held that we would weigh the possible harm of the instruction in the context of each case. We do not believe *Sandstrom* warrants any change in this analysis.

United States v. Fricke, supra, at 4562.

Fricke also contended on appeal that the trial court denied him the right to call witnesses in his defense by refusing to require Assistant United States Attorney Carl Walker, Jr. to testify without having first received per-

mission from the Attorney General. The trial court found that Fricke had failed to comply with certain federal regulations, 28 C.F.R. §§ 16.21 - 16.26, which require the prior approval of the Attorney General or an appropriate Justice Department official before a Justice Department employee may disclose information obtained as a part of the performance of official duties. The Fifth Circuit failed to reach the constitutionality of these regulations as applied in this case. The Fifth Circuit in discussing the exclusion of the desired testimony concluded that: "[t]he desired testimony was indecisive, nonexculpatory, and concerned an occurrence long *after* the beating. Given this, and that Fricke made absolutely no effort to comply with the regulations, and did not seek a recess or continuance to have more time to do so, we find that no reversible error occurred." *United States v. Fricke, supra,* at 4568 (emphasis supplied).

One issue in question was the location of the Petitioner on a certain date at a certain time. The defense contended that the Petitioner had not been where the prosecution claimed he had been, but instead was testifying as a government witness before a federal grand jury at that time (R. X, 112, 114). In order to establish this, a subpoena was issued to the Assistant United States Attorney handling the grand jury that day (R. XI, 34). The Government objected to the calling of Assistant United States Attorney Walker as a witness, as well as to the subpoenas of two other Department of Justice employees who were to serve solely as character witnesses, because the defense had not complied with the affidavit requirement of 28 C.F.R. § 16.23(c). The trial court sustained the objection, and the witnesses were not called (R. XI, 36-37).

The contested point on appeal was whether an internally-generated administrative regulation of one adversary in a criminal proceeding outweighed the constitutional guarantees a citizen-accused has to due process of law, flowing from the Fifth Amendment, and compulsory process and effective assistance of counsel derived from the Sixth Amendment.

The Petitioner relied on *United States v. Feeney*, 501 F. Supp. 1337, 1342 (D. Colo. 1980) in which the United States District Court held that "since the Government which prosecutes an accused has the duty also to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense . . ."

The Fifth Circuit concluded that since the desired testimony, in their opinion, was not exculpatory, and that the Petitioner made no effort to comply with the regulations, and did not seek more time to do so, no reversible error occurred.

On August 25, 1982, the Panel delivered its opinion affirming the conviction. Because of the lack of clarity of the law in the Fifth Circuit dealing with burden-shifting jury instructions on intent, and the great importance of the question dealing with the non-statutory requirement that the Attorney General approve the appearance of a Department of Justice employee subpoenaed by a defendant, after notice of the content of the proposed testimony, the Petitioner respectfully suggested that the En Banc Court of Appeals rehear the appeal on these two issues. The Suggestion for Rehearing En Banc was denied on October 4, 1982. See Appendix B.

REASONS FOR GRANTING CERTIORARI

I. THE DISTRICT COURT'S INSTRUCTING THE JURY THAT AN ACCUSED IS PRESUMED TO INTEND ALL THE NATURAL AND PROBABLE CONSEQUENCES OF AN ACT KNOWINGLY DONE VIOLATED DUE PROCESS OF LAW IN THAT THE GOVERNMENT WAS RELIEVED OF THE BURDEN TO PROVE THE SPECIFIC INTENT ELEMENT OF THE OFFENSES CHARGED, IS IN CONFLICT WITH THIS COURT'S DECISION IN *SANDSTROM v. MONTANA*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), AND CANNOT CONSTITUTE HARMLESS ERROR.

A. The District Court's Instruction Violates Due Process Of Law And Is In Conflict With This Court's Decision In *Sandstrom v. Montana, supra.*

In *Sandstrom v. Montana, supra,* this Court was faced, in a criminal action, with the question whether the jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts," in a case in which intent is an element of the crime charged, violates the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. *Sandstrom,* 442 U.S. at 512. In reversing the conviction because of the charge given by the trial court, this Court clearly recognized that a conclusive presumption or an instruction which has the effect of shifting the burden of persuasion to the Defendant deprives the defendant of due process of law.

The District Court in the instant case instructed the jury as follows:

> I charge you that a person ordinarily is presumed to intend all the natural and probable consequences of an act knowingly done. The burden of proof as to each element of the offense remains, however, with the government.
>
> If you find that the defendants knew what they were doing and that they intended to do what they were doing and if you find that what they did constituted a deprivation of a constitutional right, then you may conclude that the defendants acted with the specific intent to deprive the victim of that constitutional right.

(R. XIII, 47).

The District Court's instruction is similar to the instruction struck down in *Sandstrom*. This Court held in *Sandstrom* that the jury could easily have viewed an instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" as mandatory. 442 U.S. at 517. This Court recognized that there was a risk that the jury, once having found Sandstrom's act voluntary, would interpret the instruction as directing a finding of intent. "[A] reasonable jury could well have interpreted the presumption as 'conclusive', that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption." *Id.*

Alternatively, this Court found that the jury may have interpreted the instruction as one shifting the burden of persuasion to the defendant to disprove the element of intent. This Court concluded that either interpretation had the effect of relieving the State of the burden of proof on the critical question of Sandstrom's state of mind.

The Fifth Circuit also recognized in the case at bar, that even if the jury did not treat the presumption as conclusive, the instruction may have had the effect of shifting the burden to the Petitioner to show that he did not have the specific intent. *United States v. Fricke, supra.* at 4562, n. 2. The Court of Appeals also recognized that the curative instruction in the present case may not have eliminated all error in the use of 'presumed'. *Id.*

This Court held in *Sandstrom*:

> [T]he fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the other of these latter interpretations. And that means that unless these kinds of presumptions are constitutional, the instruction cannot be adjudged valid.

442 U.S. at 519.

In determining the constitutionality of these kinds of presumptions, this Court used the line of reasoning set forth in *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This Court ruled in *Winship* that due process requires proof beyond a reasonable doubt of every fact necessary to prove the crime with which the accused is charged.

If the Court of Appeals was not sure whether all error from the use of the presumptive instruction was eliminated in this case, how may the instruction be upheld, when the standard in a criminal case requires proof beyond a reasonable doubt?

The element of specific intent had to be established by the prosecution beyond a reasonable doubt and it is respectfully submitted that the Court of Appeals was in error, when, at page 4563 of the slip opinion it stated, "[S]pecific intent was not a critical question in the case." Shifting the burden of proof, by the use of this instruction, influenced the jury decision and eliminated the mandatory requirement of proof beyond a reasonable doubt on *each* and *every* element. In addition, the burden on the prosecution was not lessened because the Petitioner presented no conflicting evidence, since the "not guilty" plea put every element in issue, each requiring proof beyond a reasonable doubt. Thus, the Court of Appeals, after recognizing the requirement of proving the element of specific intent, erred when it stated at page 4563: "This burden is much easier though when the defendant presents no conflicting evidence on the issue." The fundamental nature of the constitutional problem is not waived because the Defendant's counsel failed to object to the prohibited instruction.

Therefore, the Petitioner in this case was denied due process of law since the Government was relieved of the burden to prove beyond a reasonable doubt every fact that was necessary to constitute the crime with which the Petitioner was charged.

B. The District Court's Use Of A Presumptive Instruction Which Shifts The Burden To The Defendant To Disprove An Element Of The Offense Cannot Constitute Harmless Error.

This Court held in *Sandstrom* that an instruction which constitutes either a burden-shifting presumption or a con-

clusive presumption deprives the defendant of his right to due process of law and therefore is unconstitutional. This Court, however, declined to reach whether the question of an unconstitutional jury instruction on an element of the crime is reversible error in every case.

The State's argument in *Sandstrom*, that the instruction constituted harmless error, and the Petitioner's reply, that an unconstitutional jury instruction on an element of the crime can never constitute harmless error, had not been considered by the Supreme Court of Montana. Therefore, this Court left that issue for the Montana Court to consider on remand.

The Petitioner respectfully invites this Court to address the question of whether a presumptive instruction in a criminal case, which shifts the burden of proof to the Defendant to disprove an element necessary to prove the crime, is such a denial of due process that it can never result in harmless error.

The opinion of the Court of Appeals in the case at bar recognized the problem of the use of instructions which shift the burden of proof to the Defendant. "Once more, however, we urge trial courts to avoid the use of presumptive language in instructions." *Fricke, supra*, at 4563, n.3. The Court of Appeals also recognized in this case that their *en banc* solution to presumptive charges in *United States v. Chiantese*, 560 F.2d 1244 (5th Cir. 1977), *cert. denied*, 441 U.S. 922, 99 S.Ct. 2030, 60 L.Ed.2d 395 (1979), had not been entirely successful since courts continue to give questionable instructions. However, the Court of Appeals stated in deciding this case that they had refused to adopt a *per se* rule of re-

versal for these type of charges in *Chiantese*, but instead would weigh the possible harm of the instruction in the context of each case.

The constitutional implications require that, if the appellate court is to affirm the case below, it must be able to find that whatever the error, it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Mason v. Balkcom*, 669 F.2d 222 (5th Cir. 1982).

In determining whether the instruction was harmless beyond a reasonable doubt, the Court of Appeals decided that specific intent was not a critical question in this case. "Under these circumstances, if a jury concluded that a beating took place, it would undoubtedly encompass a finding that the defendant had the requisite intent. The jury's verdict necessarily reflects that a beating took place, and that it occurred while Hintz was in custody. It is plain that Fricke had the requisite specific intent." *Fricke, supra* at 4563.

Thus, here the Petitioner could be convicted upon a showing by the government that he knew he struck Hintz and intended to strike him, without any further showing that he intended to violate 18 U.S.C. § 241 and 18 U.S.C. § 242, that is to conspire to violate and to violate the civil rights of Hintz. The vice of a mandatory presumption is thereby illustrated: upon evidence sufficient perhaps to show assault, a citizen can be presumed guilty of a greater offense. The government is relieved of proving its case beyond reasonable doubt. The Petitioner contends that under these circumstances, specific intent was a crucial question in the case.

The Petitioner further submits that a presumptive instruction, which shifts the burden to the defendant to disprove a necessary element of the offense in a criminal case, subjects the defendant to irreparable harm which cannot be remedied by determining the constitutionality of the instruction on a case-by-case analysis. "*[T]he trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act . . . A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense . . . [T]his presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.*" *Sandstrom*, 442 U.S. at 522, (emphasis in original), citing to *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

This case shows the danger of weighing the possible harm of the instruction by the context of each case by allowing the appellate court to presume the very same thing that the instruction presumes: that the specific intent was proved by merely proving the act. It also allows the appellate court to decide whether an element of the offense is a "crucial question" in the case. As stated in *Sandstrom*, the presumption of innocence extends to *every* element of the offense.

More significantly, this type of analysis requires the appellate court to determine the effect such instruction had on the jury. As this Court recognized in *Sandstrom*:

> [E]ven if a jury could have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they

> *did* do. As the jury's verdict was a general one, . . . we have no way of knowing that Sandstrom was not convicted on the basis of the unconstitutional instruction. And "[i]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside".

Sandstrom, 442 U.S. at 526, (emphasis in original).

This Court has permitted a shift in the burden of proof only with respect to factors that do not constitute elements of the crime charged. In *Jacks v. Duckworth*, 651 F.2d 480 (7th Cir. 1981), the Honorable Judge Swygert pointed out in his dissenting opinion the difference between an instruction which shifts the burden to the defendant to disprove an element necessary to prove the crime charged and an instruction that shifts the burden of proof only with respect to factors that do not constitute elements of the crime charged. Judge Swygert distinguished this Court's opinions in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) and *Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952) from the opinion in *Sandstrom v. Montana, supra*. In *Patterson v. New York, supra*, the defendant was required to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance to reduce the crime from murder to manslaughter. Because the State had proved the necessary elements of murder, this Court held in *Patterson* that due process did not require it to prove the absence of the affirmative defense. In *Leland v. Oregon, supra*, this Court held that Oregon could shift the burden of proof on the insanity defense so long as the State had already proved

beyond a reasonable doubt every element of the crime, including premeditation and deliberation.

The distinction, as noted by Judge Swygert in *Jacks v. Duckworth, supra,* between these cases and *Sandstrom* is that in *Sandstrom* this Court held the instruction unconstitutional because it shifted the burden of proof on intent, an essential *element* of the crime charged. The instruction given in the case at bar suffers from the same infirmity, in that it shifted the burden of proof on intent.

Since intent is one of the elements of the crimes for which the Petitioner was convicted, the Court of Appeals erred in upholding a jury charge that required the Petitioner to disprove one of the elements of the crime charged. The jury charge violated the direction set out by the *en banc* Court of Appeals for the Fifth Circuit in 1977 in *Chiantese, supra,* that: "1) No district court shall include in its charge to the jury an instruction on proof of intent which is couched in language which could reasonably be interpreted as shifting the burden to the accused to produce proof of innocence . . . 2) The error in giving such a burden-shifting charge will not be absolved because other phrases defining the proper burden of proof are included in the instructions, no matter how often such corrective phrases are repeated. *This Court no longer will harmonize inconsistent charges to effect the cure* of a charge in violation of paragraph one." 560 F.2d at 1255 (emphasis added).

Therefore, the Petitioner suggests that this Court adopt a rule that would bar the submission of these instructions in every case, to ensure that courts will refrain from using an instruction which is conclusive or which has the effect of shifting the burden to the defendant to disprove an element of the crime charged.

II. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN FAILING TO REACH THE CONSTITUTIONALITY OF THE FEDERAL REGULATION, AS APPLIED IN THIS CASE, WHICH REQUIRED AN ACCUSED CITIZEN TO DETAIL IN ADVANCE THE CONTENT OF THE TESTIMONY OF HIS OWN WITNESS TO THE SUPERIOR OFFICER OF HIS TRIAL ADVERSARY, AND OBTAIN THAT OFFICER'S APPROVAL PRIOR TO CALLING THE WITNESS, IN VIOLATION OF DUE PROCESS OF LAW FLOWING FROM THE FIFTH AMENDMENT, AND THE DEFENDANT'S RIGHT TO PRESENT WITNESSES, TO COMPULSORY PROCESS, AND TO EFFECTIVE ASSISTANCE OF COUNSEL, GUARANTEED BY THE SIXTH AMENDMENT.

This Petition for Certiorari presents a point of error which calls for this Court's attention to determine an important question never before addressed by this Court.

One issue in question was the location of the Petitioner on a certain date at a certain time. The defense contended that the Petitioner had not been at a cover-up meeting as the prosecution claimed he had been, but instead was testifying as a government witness before a federal grand jury at that time. In order to establish this, a subpoena was issued to the Assistant United States Attorney handling the grand jury that day. The trial court sustained the Government's objection to the calling of Assistant United States Attorney Walker as a witness, because the defense had not complied with the affidavit requirement of 28 C.F.R. § 16.23(c).

The Fifth Circuit declined to reach the constitutionality of these regulations as applied in this case. Nor did it

decide whether the trial court properly determined that the regulations applied to the information sought by the Petitioner. The Court of Appeals concluded that "[t]he desired testimony was indecisive, nonexculpatory, and concerned an occurrence long *after* the beating." *Fricke, supra,* at 4568 (emphasis in original). The Court continued, "Fricke made absolutely no effort to comply with the regulations, and did not seek a recess or continuance to have more time to do so, we find that no reversible error occurred." *Id.*

The Petitioner respectfully suggests that the Court of Appeals did not observe the reason the Petitioner needed to call this witness: the presentation of testimony by the witness Walker was essential to attacking the credibility of the adverse witnesses.

The Court of Appeals' conclusion that Walker's testimony was immaterial is a jury question which should have been decided by jurors after hearing the relevant testimony of the witness. Had the jury had an opportunity to hear the testimony, they may have believed the Petitioner had been subpoenaed before the grand jury, and therefore that a key prosecution witness was lying when he testified that the Petitioner was at a cover-up meeting in a different city on the date in question.

A citizen accused of crime in this country has a right to compulsory process to secure the attendance of any witnesses in his behalf. *U.S. Const.* Amend. VI. This right to present a defense has been held by this Court to be a fundamental element of due process of law. *Washington v. Texas,* 338 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

The Court of Appeals emphasized that the Defendant made no attempt to comply with the provisions of 28

C.F.R. § 16.22, which requires the prior permission of the appropriate Department official or the Attorney General before a Department of Justice employee may disclose information acquired as part of the performance of his official duties. That is correct. He intentionally chose not to do so. That is not the issue in this case. The contested point is whether an internally-generated administrative regulation of one adversary in a criminal proceeding outweighs the constitutional guarantees a citizen-accused has to due process of law, flowing from the Fifth Amendment, and compulsory process and effective assistance of counsel, derived from the Sixth Amendment.

First, in the case at bar, no information within the meaning of "acquired as a part of the performance of his official duties" was requested of the witness Walker. His potential testimony that the Petitioner indeed did testify before the grand jury on a certain date, and at a certain location, would in no way jeopardize any confidential information or hinder the performance of the United States Attorney's office in the execution of its legitimate function. Therefore, it was error to refuse to honor the subpoena issued to the witness Walker to compel his testimony.

Second, assuming *arguendo* that such information *was* gained in the performance of Walker's duties, the balancing test between administrative regulations and constitutional safeguards in the Bill of Rights must result in affording the protection of the Constitution to the accused. How can the government, an adversary in a criminal trial, unilaterally require the Defendant to inform him in advance of the requested testimony, much less seek the

adversary's permission to challenge or destroy the government's case?

The only cases discovered on this issue are from the Tenth Circuit. A case directly on the issue that traces the development of what little law exists in relation to 28 C.F.R. § 16.21 *et seq.* is *United States v. Feeney*, 501 F. Supp. 1337 (D. Colo. 1980). The Chief Judge of the United States District Court for the District of Colorado, the Hon. Fred M. Winner, reached the conclusion that the case often cited by Justice Department lawyers as a *carte blanche* endorsement of 28 C.F.R. § 16.21, *et seq.*, *Touhy v. Ragen*, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951) really never reached the legality of the order. Judge Winner was faced with a motion for new trial in a criminal case, where the Department of Justice had relied on 28 C.F.R. § 16.21 *et seq.* to prevent the testimony by the Assistant Attorney General of the United States, an Assistant United States Attorney, and an investigator in his office, regarding certain tape recordings held by the Government. He traced the law from *Touhy* through *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), a civil case where a claim of privilege was made by the Secretary of the Air Force, to *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), where the President of the United States claimed executive privilege.

Judge Winner quoted the following passage from *Reynolds, supra*:

> Respondents have cited us to those cases in the criminal field, where it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The

> rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented.

501 F. Supp. at 1344.

He then concluded that, among others, the following procedures would be followed:

1. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing, the privilege is designed to protect.
   United States v. Reynolds, supra.

2. To uphold privilege claims, it must appear that there is risk of disclosure of state or military secrets or that the interests of justice demand confidentiality.
   United States v. Reynolds, supra.

3. Upon demand of the government, some sort of an in camera hearing should be structured.
   United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

4. The ultimate decision as to a right of secrecy is for the court and not for the executive branch.
   United States v. Reynolds, supra, and *United States v. Nixon, supra.*

Id. at 1347.

He then denied the motion to quash, ordered the appearances of all three witnesses, and set a hearing to take testimony in open court, or, at the request of the Government, *in camera.*

After the Government filed a petition for writ of mandamus to compel the District Court to vacate its order, the United States Court of Appeals for the Tenth Circuit agreed with Judge Winner that the Government had not met the requirements of the law enforcement evidentiary privilege, and denied the writ. *United States v. Winner,* 641 F.2d 825, 832 (10th Cir. 1981). The Court of Appeals went on to approve a compromise agreement wherein the Assistant United States Attorney and the Investigator would testify *in camera* with the defendant and defense counsel present. *Id.* at 832-33.

Public policy, fundamental fairness, and the supervisory function of this Court all call for establishing the rule that 28 C.F.R. § 16.21 *et seq.* cannot override a criminal defendant's constitutional right to compulsory process, to assistance by counsel free to try his case without the hamstringing requirement to telegraph his case to his opponent, and to a fair trial conducted within the parameters of due process of law. The Court of Appeals' refusal to reach this issue calls for this Court to grant a Petition for Certiorari to address this question of first impression.

Furthermore, it is asserted that this issue is one of constitutional dimension, and that the Court of Appeals erred for the further reason that there is no holding that the error was harmless beyond a reasonable doubt, as required by *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *See United States v. Fricke, supra.*

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the within and foregoing Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit by mailing 4 copies thereof to counsel of record in envelopes properly stamped and addressed as follows:

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